2001

BMC West Corporation v. Desert Crest Development, Inc., Jessica Barker, Does : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

BMC WEST CORPORATION,

Plaintiff-Appellee,

vs.

DESERT CREST DEVELOPMENT, INC., JESSICA BARKER, and DOES 1-20,

Defendants-Appellants

Case No 20010269-CA

Priority No. 15

BRIEF OF DEFENDANTS-APPELLANTS

APPEAL FROM THE FINAL ORDER GRANTING MOTION TO STRIKE AFFIDAVIT, TO DECLARE ADMITTED REQUESTS FOR ADMISSIONS, FOR RULE 37 SANCTIONS, AND FOR SUMMARY JUDGMENT BY THE THIRD JUDICIAL DISTRICT COURT FOR THE COUNTY OF SALT LAKE WITHIN THE STATE OF UTAH THE HONORABLE WILLIAM A THORNE PRESIDING

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STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Court pursuant to Utah Code Ann , § 78-2a-3(2)(j), (1996)

ISSUES PRESENTED FOR REVIEW

The issues for this court to review are (1) whether the lower court abused its discretion by granting the Motion to Strike Defendants' December 13, 1999, affidavit (Preserved at R. 284-291), and (2) whether the lower court erred in its conclusion of law in granting summary judgment to the Plaintiff (Preserved at Id.).

1. Abuse of Discretion Standard of Review.

The standard of review is "abuse-of-discretion."

The abuse-of-discretion standard flows from the trial court's significant role in pre-appellate litigation. The trial court has "a great deal of latitude in determining the most fair and efficient manner to conduct business." *Morton v. Continental Banking Co.,* 938 P.2d 271, 275 (Utah 1997). This is because "[t]he trial judge is in the best position to evaluate the status of his cases, as well as the

attitudes, motives, and credibility of the parties " *Id.*

Until an appellate court has determined that a particular fact situation does or does not satisfy the legal standard at issue, the trial court has discretion to venture into that area and to make that determination *See State v. Pena,* 869 P 2d at 939-40 (Utah 1994) A trial court abuses its discretion if there is "no reasonable basis for the decision " *Crookston v. Fire Ins. Exch.*, 860 P 2d 937,938 (Utah 1993) A trial judge's determination should be reversed if the ruling "is so unreasonable that it can be classified as arbitrary and capricious or a clear abuse of discretion "*Crookston v. Fire Ins. Exch.*, 860 P.2d 937,938 (Utah 1993).

As for Rule 37 sanctions, a trial court has broad discretion to select and impose sanctions for discovery violations *See Pennington v. Allstate Ins. Co.*, 973 P 2d 932, 940 (Utah 1998) *Tuck v Godfrey,* 367 Utah Adv Rep 42, 43 (Utah Ct App 1999) An appellate court "will find that a trial court has abused its discretion in choosing which sanction to impose only if there is either an 'erroneous conclusion of law or no evidentiary basis for the trial court's ruling '" *Morton v. Continental Baking Co.*, 938 P 2d 271, 274 (Utah 1997)

2 Correctness Standard of Review

In considering an appeal from a grant of summary judgment, the appellate court views the facts in a light most favorable to the losing party below And in determining whether those facts require, as a matter of law, the entry of judgment for the prevailing party below, the appellate court gives no deference to the trial court's conclusion of law, which are reviewed for correctness *Blue Cross & Blue Shield v. State,* 779 P 2d 634 (Utah 1989)

Legal determinations are defined as "those which are not of fact but are essentially of rules or principles uniformly applied to persons of similar qualities and status in similar circumstances "

State v. Pena, 869 P.2d at 935 (Utah 1994) "[A]ppellate review of a trial court's determination of the law is usually characterized by the term 'correctness '" *Id.* at 936; *accord Drake v. Industral Comm'n,* 939 P.2d 177, 181 (Utah 1997), *Stangl v. Ernst Home Ctr., Inc.*, 948 P.2d 356, 360 (Utah Ct. App. 1997) "Utah case law teaches that 'correctness' means the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." *Pena,* 869 P.2d at 935. Thus the broadest scope of judicial review extends to questions of law "This is because appellate courts have traditionally been seen as having the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction." *Pena,* 869 P.2d at 936

On appeal, the question of whether a party is entitled to summary judgment is a question of law. *See Gerbich v. Numed, Inc.*, 977 P.2d 1205, 1207 (Utah 1999), *Coulter & Smith v. Russell,* 976 P.2d 1218, 1221 (Utah Ct. App. 1999). "Because summary judgment is granted as a matter of law, [appellate courts] give the trial court's legal conclusions no particular deference " *Mast v. Overton,* 971 P.2d 928, 931 (Utah Ct. App. 1998).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES ETC

The applicable Rules determinative of the propriety of the lower court's ruling are Rules 37 and 56 of the Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

On or about February 6, 2001, Judge William A. Thorne of the Third District Court signed the Order Granting a Motion to Strike an affidavit filed by the Appellants in response to a previously unsuccessful Summary Judgment motion filed by the Appellee. The order also declared Admitted Request for Admissions, granted Rule 37 Sanctions and granted Summary Judgment for the Appellee. R. 315-317. Appellants now appeal.

STATEMENT OF THE FACTS

1. Appellee, BMC West Corporation, Filed a Complaint in the Third Judicial District Court on or about April 23, 1999, and served the same with Summons on Appellants on May 19, 1999. R. 1-3. Appellants filed an Answer to the Complaint on or about June 10, 1999. R. 10-13.

2. Appellee, BMC West Corporation, propounded Interrogatories and Request for Production of Documents to Appellants, Desert Crest Development, Inc., and Jessica Barker, on or about the 15th day of June, 1999. R. 13-22. On or about August 12, 1999, BMC West Corporation filed a Motion to Compel and for Sanctions and Request for Expedited Decision. R. 26-27. The Motion to Compel and for Sanctions was granted on October 7, 1999. R. 43. However, Appellants were not made aware of the particulars of the order nor were they furnished a signed copy of the order until January 3, 2000. R. 193.

3. On or about the 15th day of October, 1999, Appellants, responded to Appellee's First Set of Interrogatories and Request for Production of Documents. R. 45, 154-164

4. On or about the 30th day of November, 1999, BMC West Corporation filed its Motion for Summary Judgment. R. 143. On or about the 13th day of December, 1999, Appellants filed a Memorandum in Opposition to the Motion for Summary Judgment supported by an Affidavit of Jessica Barker. R. 168-180.

5. On or about the 28th day of December, 1999, BMC West Corporation filed its Reply Memorandum in Support for Summary Judgment, together with a Notice to Submit for Decision. R. 148-166. The Motion for Summary Judgment was denied on February 4, 2000. R. 183.

6. On or about the 16th day of February, 2000, BMC West Corporation filed a Motion for Rule 37 Sanctions, together with a Memorandum in Support of the Motion. R. 185, 187-190. On or

about the 3rd day of March, 2000, Appellants filed a Response to Motion for Rule 37 Sanctions R 191-195

7 On or about the 10th day of February, 2000, BMC West Corporation propounded its Second Set of Interrogatories, Request for Admissions and Request for Production of Documents to Appellants R 207-209

8 On or about March 21, 2000, BMC West Corporation filed its Reply Memorandum in Support of the Motion for Rule 37 Sanctions R 191-195

9. On August 29, 2000, Appellee took the deposition of Jessica Barker R 221-222, 240-280 Appellee requested the deposition of Ben Mangelsen, husband to Jessica Barker and former employee of Desert Crest Development, Inc R 229-230 Mr Mangelson is a key witness as to the disputed facts of this case R 281-283

10 On or about November 22, 2000, BMC West Corporation filed its Memorandum in Support of Motion to Strike Affidavit, to Declare Admitted Request for Admissions, for Rule 37 Sanctions and for Summary Judgment R 227-280 On or about December 15, 2000, Appellants filed a Response to the Motion to Strike Affidavit, to Declare Admitted Request for Admissions, for Rule 37 Sanctions and for Summary Judgment R 284-290 Jessica Barker also executed an Affidavit in support of her Response to Motion to Strike Affidavit, to Declare Admitted Request for Admissions, for Rule 37 Sanctions and for Summary Judgment R 281-283

11 On or about December 26, 2000, BMC West Corporation filed its Reply Memorandum in Support of Motion to Strike Affidavit, to Declare Admitted Request for Admissions, for Rule 37 Sanctions and for Summary Judgment R 292-299

12 On or about February 6, 2001. the Court signed the Order Granting the Motion to Strike

Affidavit, to Declare Admitted Request for Admissions, for Rule 37 Sanctions and for Summary Judgment. R. 315-317.

13 Appellants now appeal the Order of the Trial Court granting the Motion to Strike Affidavit, to Declare Admitted Request for Admissions, for Rule 37 Sanctions and for Summary Judgment.

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in striking Appellants' December 13, 1999 Affidavits. The trial court also erred in its conclusion of law that Appellee was entitled to Summary Judgment as a matter of law.

ARGUMENT

POINT I

THE TRIAL COURT ABUSED HIS DISCRETION IN STRIKING THE AFFIDAVIT OF JESSICA BARKER.

By granting the Motion to Strike Affidavit, to Declare Admitted Request for Admissions, for Rule 37 Sanctions and for Summary Judgment, the trial court abused its discretion. The trial court based the order to strike the affidavit upon the notion that the Appellants were in violation of the October 7, 1999 order, which reads in relevant part, "The Court orders that Defendants are estopped from denying the completeness of their responses, and from offering any evidence requested in the discovery and not produced in Defendants' responses." R. 43.

The information Appellants provided in their affidavit was also provided to Appellee in the form of answers to Appellee's first set of Interrogatories. Therefore, it was unreasonable for the trial court to interpret Appellants' December 13, 1999, affidavit as not complying with the October 7,

1999, order.

"Before a trial court can impose discovery sanctions under Rule 37, the court must find on the part of the noncomplying party willfulness, bad faith, or fault " *Morton v. Continental Baking Co.*, 938 P.2d 271, 274 (Utah 1997). Appellants did not submit the December 13, 1999, affidavit in bad faith, nor with fault or willfulness to disobey the trial court's order of sanctions.

Furthermore, Rule 56(c) of the Utah Rules of Civil Procedure allows a party to submit affidavits in opposition to a motion for summary judgment. Appellants' December 13, 1999, affidavit was submitted in conjunction with Appellants' Memorandum in Response to Appellee's November 30, 1999, Motion for Summary Judgment.

Because the affidavit was arguably in accordance with the court order and because submitting an affidavit to counter a motion for summary judgment is permitted by Rule 56(c) of the Utah Rules of Civil Procedure, the trial court abused its discretion by sanctioning Appellants in such a heavily prejudicial fashion. The December 13, 1999, Affidavit should not have been stricken as a sanction against Appellants for not adhering to the October 7, 1999, order.

POINT II

GRANTING SUMMARY JUDGMENT FOR THE APPELLEE WAS ERRONEOUS

Though the Appellee was successful in persuading the trial court to strike Appellant's December 13, 1999, affidavit which clearly sets forth the disputed facts of the case, and to declare admitted request for admissions, the trial court erred in granting Summary Judgment for the Appellee because even absent the affidavit, Appellants gave ample showing, through answers to interrogatories, pleadings, and depositions, that genuine issues of material fact existed. See R. 168-

174 In *Hatch v. Sugarhouse Fin. Co*, 20 Utah 2d 156, 434 P 2d 758 (1967), the Supreme Court found that summary judgment was erroneously entered for plaintiff where an issue of fact was raised by the pleadings and counter-affidavit of defendant Such is the present case

Summary judgment should not be granted unless the pleadings, depositions, admissions, and affidavits in a case show that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law, the summary judgment tool is not used to try an issue of fact, but rather to determine whether one exists, hence, if all the evidence is viewed most favorably for the nonmovant and facts are present upon which reasonable persons could disagree or if they lead to inferences that can be fairly drawn and present different conclusions, then summary judgment should not be granted *Bridge v. Backman,* 10 Utah 2d 366, 353 P 2d 909 (1960), *Krantz v Holt,* 819 P 2d 352 (Utah 1991), *Billings v. Union Bankers Ins Co*, 819 P 2d 803 (Utah 1991)

If there is any issue as to any material fact, a motion for summary judgment should be denied *Young v. Felornia,* 121 Utah 646, 244 P 2d 862, cert denied, 344 U S 886, (1952), *Ruffingengo v. Miller,* 579 P 2d 342 (Utah 1978) In Appellant's successful December 13, 1999, Memorandum in Opposition to Summary Judgment, Appellants set forth a list of six material facts in dispute, three of which are supported by Appellants' answers to Interrogatories R 168-169

In its Order granting Summary Judgment, the trial court stated, " the Court having reviewed the memoranda, affidavits, and other papers of the parties, being fully informed and in good cause appearing, finds [Appellee's] motion has merit " However, more than "merit" is required as a matter of law in ruling in favor of summary judgment In this, the trial court erred In determining whether to grant summary judgment the trial court is required to view the evidence most favorable to the nonmoving party

Furthermore, summary judgment should not be granted if discovery is incomplete, since information sought in discovery may create genuine issues of material fact sufficient to defeat the motion. *Downtown Athletic Club v. Horman,* 740 P.2d 275 (Utah Ct. App.), cert. denied, 765 P.2d 1277 (1987). In the present case, discovery was not complete. Ben Mangelson, a key witness to the disputed facts, was preparing to be deposed by the Appellee.

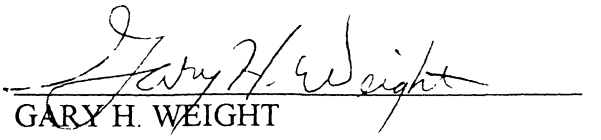
Because material issues of disputed facts exist in this case, was the trial court's decision to grant summary judgment erroneous.

CONCLUSION

For the reasons presented heretofore, the Appellants pray this Court overturn the decision of the trial court granting the Motion to Strike Affidavit, to Declare Admitted Request for Admissions, for Rule 37 Sanctions and for Summary Judgment. The Appellants move this court to remand this case back to the trial court for further proceedings.

DATED this 12th day of July, 2001.

ALDRICH, NELSON, WEIGHT& ESPLIN



GARY H. WEIGHT
Attorney for Appellants

MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, this 12th day of July, 2001, two copies of the foregoing Brief of Defendants-Appellants to the following:

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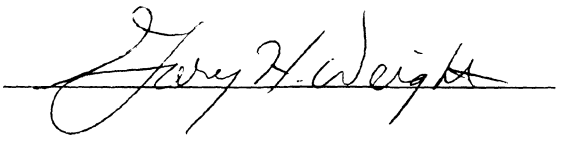

ADDENDUM

Rule 37 the Utah Rules of Civil Procedure

Rule 56 of the Utah Rules of Civil Procedure

Utah Code Ann , § 78-2a-3(2)(j)

Punitive damages.

Where plaintiff requests an admission of punitive damages in an amount unrelated to actual damages, the court as a matter of equity must intervene and examine the admission Jensen v Pioneer Dodge Ctr, Inc, 702 P2d 98 (Utah 1985)

Withdrawal of admissions.

A finding of prejudice, and consequent refusal to permit withdrawal of admissions, was not an abuse of the trial court's discretion where the circumstances included a concession by the father that the child would not return to his home regardless of whether he was found to have abused the child Therefore, the admissions did not directly jeopardize a proper determination of the child's best interests State, Div of Child & Family Servs v N R., 2000 UT App 143 2 P3d 948

Cited in Utah Sand & Gravel Prods. Corp. v. Salt Lake County Comm'n, 14 Utah 2d 151, 379 P2d 379 (1963), WW & WB Gardner, Inc. v. Park W Village, Inc, 568 P2d 734 (Utah 1977); In re Pendleton 2000 UT 77 11 P3d 284

COLLATERAL REFERENCES

Utah Law Review. — Utah Rules of Evidence 1983 — Part III, 1995 Utah L. Rev 683

Am. Jur. 2d. — 23 Am Jur 2d Depositions and Discovery §§ 314 to 325

C.J.S. — 27 C J S Discovery §§ 88 to 110

A.L.R. — Continuance sought to secure testimony of absent witness in civil case, admissions to prevent, 15 A.L R 3d 1272

Party's duty, under Federal Rule of Civil Procedure 36(a) and similar state statutes and rules, to respond to request for admission of facts not within his personal knowledge, 20 A.L.R.3d 756

Formal sufficiency of response to request for admissions under state discovery rules, 8 A.L.R.4th 728

Permissible scope, respecting nature of inquiry, of demand for admissions under modern state civil rules of procedure, 42 A.L R 4th 489

Rule 37. Failure to make or cooperate in discovery; sanctions.

(a) *Motion for order compelling discovery.* A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate court* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.*

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) *Evasive or incomplete disclosure, answer, or response.* For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) *Expenses and sanctions.*

(A) If the motion is granted, or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after opportunity for

hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after opportunity for hearing, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) *Failure to comply with order.*

(1) *Sanctions by court in district where deposition is taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken. the failure may be considered a contempt of that court.

(2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 16(b), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) where a party has failed to comply with an order under Rule 35(a), such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney or both of them to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Expenses on failure to admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable

expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the party's attorney or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) *Failure to participate in the framing of a discovery plan.* If a party or attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

(f) *Failure to disclose.* If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rules 26(e)(1), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court may order any other sanction, including payment of reasonable costs and attorney fees, any order permitted under subpart (b)(2)(A), (B) or (C) and informing the jury of the failure to disclose.

(Amended effective Jan. 1, 1987; November 1, 1999; November 1, 2000.)

Advisory Committee Note. — For a complete explanation of the 1999 amendments to this rule and the interrelationship of these amendments with the other discovery changes, see the advisory committee note appended to Rule 26. The Supreme Court order approving the amendments directed that the new procedures be applicable only to cases filed on or after November 1, 1999.

Amendment Notes. — The 1999 amendment substituted "Rule 16(b)" for "Rule 26(f)" in Subdivision (b)(2); in Subdivision (b)(2)(E) deleted "requiring him to produce another for examination" after "Rule 35(a)" and "shows that he" after "failing to comply"; substituted "party's attorney" for "attorney advising him" in the third sentence of Subdivision (d); added Subdivision (f); and made stylistic and gender neutral changes throughout the rule.

The 2000 amendment added Subdivision (a)(2)(A); redesignated existing Subdivision (a)(2) as (a)(2)(B), adding the second sentence and deleting a provision authorizing protective orders after denial of the motion; added references to disclosure and response to Subdivision (a)(3); in Subdivision (a)(4), added "and sanctions" to the heading, added the provisions in Subdivision (a)(4)(A) regarding post-motion compliance and court findings on good faith efforts, added provisions authorizing protective orders to Subdivisions (a)(4)(B) and (C), and inserted "after opportunity for a hearing" in Subdivision (a)(4)(C); added "or Rule 26(e)(1)" in Subdivision (f); and made stylistic changes.

Compiler's Notes. — This rule corresponds to Rule 37, F.R.C.P.

Cross-References. — Contempt generally, § 78-32-1 et seq.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed 190

Rule 56. Summary judgment.

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are

presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.
(Amended effective November 1, 1997.)

Amendment Notes. — The 1997 amendment, in Subdivision (c), substituted the first sentence for the former first sentence which read "The motion shall be served at least 10 days before the time fixed for the hearing"; deleted the former second sentence which read "The adverse party prior to the day of hearing may serve opposing affidavits", and deleted "forthwith" following "rendered" in the present second sentence.

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

NOTES TO DECISIONS

Affidavit.

—Contents.

Specific facts are required to show whether there is genuine issue for trial. Reagan Outdoor Adv., Inc. v. Lundgren, 692 P.2d 776 (Utah 1984).

When a motion for summary judgment is made under this rule, the affidavit of an ad-

except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity,

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

History: C. 1953, 78-2a-3, enacted by L. 1986, ch. 47, § 46; 1987, ch. 161, § 304; 1988, ch. 73, § 1; 1988, ch. 210, § 141; 1988, ch. 248, § 8; 1990, ch. 80, § 5; 1990, ch. 224, § 3; 1991, ch. 268, § 22; 1992, ch. 127, § 12; 1994, ch. 13, § 45; 1995, ch. 299, § 47; 1996, ch. 159, § 19; 1996, ch. 198, § 49.

Amendment Notes. — The 1992 amendment, effective April 27, 1992, added Subsection (2)(h) and redesignated former Subsections (2)(h) through (j) as Subsections (2)(i) through (k)

The 1994 amendment, effective May 2, 1994, substituted "Board of Pardons and Parole" for "Board of Pardons" in Subsection (2)(h) and inserted "Administrative Procedures Act" in Subsection (4)

The 1995 amendment, effective May 1, 1995, substituted "School and Institutional Trust Lands Board of Trustees, Division of Sovereign Lands and Forestry actions reviewed by the executive director of the Department of Natural Resources" for "Board of State Lands" in Subsection (2)(a)

The 1996 amendment by ch 159, effective July 1, 1996, substituted "Division of Forestry, Fire and State Lands" for "Division of Sovereign Lands and Forestry" in Subsection (2)(a)

The 1996 amendment by ch 198, effective July 1, 1996, deleted former Subsection (2)(d), listing appeals from circuit courts, and redesignated former Subsections (2)(e) to (2)(k) as (2)(d) to (2)(j)

This section is set out as reconciled by the Office of Legislative Research and General Counsel

Cross-References. — Composition and jurisdiction of military court, §§ 39-6-15, 39-6-16

NOTES TO DECISIONS

ANALYSIS

Decisions of Board of Pardons.

The Court of Appeals hears appeals from orders on petitions for extraordinary writs challenging decisions of the Board of Pardons, except when the petition additionally challenges the conviction of or sentence for a first degree felony or a capital felony Then the appeal is to be heard by the Supreme Court Preece v House, 886 P2d 508 (Utah 1994)

Extraordinary writs.

The Court of Appeals had jurisdiction over a petition for a writ of mandamus directed against a judge of the district court based on its authority under this section to enforce compliance with a prior order and to issue writs in aid of its appellate jurisdiction Barnard v Murphy, 882 P2d 679 (Utah Ct App 1994)

The term "original" in § 78-2-2(2) adds nothing to the Supreme Court's writ jurisdiction — and its absence in Subsection (1) takes nothing from the jurisdiction of the Court of Appeals — because jurisdiction over petitions for extraordinary writs necessarily invokes a court's jurisdiction to consider a petition originally filed with it as opposed to its appellate jurisdiction over cases that originated elsewhere Barnard v Murphy, 882 P2d 679 (Utah Ct App 1994)

Because, under this section, the Court of